No. 3073

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES P. DOE, claimant of the steamship "George W. Elder", her engines, etc.,

Appellant,

vs.

COLUMBIA CONTRACT COMPANY (a corporation), and UNITED STATES FIDELITY AND GUARANTY COMPANY, stipulators,

Appellees.

BRIEF FOR APPELLEE, COLUMBIA CONTRACT COMPANY

EDWARD J. McCUTCHEN,
IRA A. CAMPBELL,
WOOD, MONTAGUE, HUNT & COOKINGHAM,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellee,
Columbia Contract Company.

PERNAU-WALSH PRINTING CO.

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I.

Statement of the Case.

Upon a dark but clear night, while the Steamer "Daniel Kern", belonging to appellee, was in the act of making fast to three loaded barges approximately five-eighths of a mile below Cooper's Point and about one thousand feet off the Washington shore on the Columbia River side, she was run into and sunk shortly after midnight on August 7, 1909, by appellant's steamship "George W. Elder".

The "Kern" had previously dropped her tow of three empty rock barges at about Cooper's Point and had returned down the river to pick up the loaded barges which had been brought down from the quarry by the river steamer "Hercules". When in towing position, the steamer carried one barge directly ahead and one on each bow, overlapping the head barge. The loaded barges, after being released by the "Hercules", had, in the few moments that had elapsed, swung around so that they were heading toward the Oregon shore, rather than downstream. While the barges were in this position, the "Kern", heading practically down the river, had come to a stop across and a short distance off the stern of the barges, and had just gotten a line out from her port bow to the port quarter of the starboard barge, intending to back on the same and thereby swing the barges into position across the "Kern's" bows. As the mate of the "Kern" was getting this line out, the "Elder", coming down stream astern of the "Kern" and headed so as to show her masthead and running lights to the "Kern", blew a one-whistle passing signal. To this the pilot of the "Kern", fearing a collision because of the course of the "Elder", replied with the danger signal. The "Elder" then repeated her passing signal, and again the "Kern" answered with four short blasts, and almost immediately thereafter the "Elder" struck the "Kern" on her starboard quarter at an angle of about 34° abaft her beam.

II.

THE ARGUMENT.

The assignment of errors does not present any question for the consideration of this court.

Rule 11 of the rules of this court provides that the assignment of errors "shall set out separately and particularly each error asserted and intended to be urged", and that errors not assigned according to the rule will be disregarded.

In the purported assignment (Ap. 641) the particulars of the errors alleged to have been committed are not set out; the conclusions there set forth are only expressions of the opinion of counsel, and do not direct the court to any fact or question of law involved. In fact, they are not exceptions or assignments of error at all. For example, not one of the four purported errors assigned charges a fault upon the part of appellee's vessel. Not one of the four purported errors assigned charges an error in any respect with reference to the lower court's views with respect to the faults committed by appellant's vessel. Not one of the four purported errors assigned charges error upon the part of the court below with respect to any of its conclusions upon the facts involved or the law claimed by appellant to have been violated. The first one merely states that the lower court erred in finding that appellant's vessel was at fault. The fourth merely states that the lower court erred in entering a decree in any sum against appellant. While the second and third state that the lower court erred in assigning the damages due appellee in any sum in excess of $25,000 and

the third is somewhat to the same point, the brief of appellant is wholly silent upon the question of damages. Assignments one and four, therefore, are the only ones to which we need address ourselves. Consideration of them, however, is unnecessary because they cannot even be said to be too general. They are not assignments of error at all. Granting, however, that they can be said to be assignments, it is obvious that their general character relieves this court of any necessity to consider them or any question discussed in appellant's brief.

In

The Natchez, 78 Fed. 183,

the court said:

> "The second assignment is that the court erred in allowing certain claims in the libel which evidence adduced by libelant did not substantiate. The general character of this assignment relieves us of any necessity to consider it."

See, also,

The Wyandotte, 145 Fed. 321;

The Stadacona, 242 Fed. 624.

The decree of the trial court should be affirmed upon a well-settled rule.

In collision cases the difficulty of discovering the truth grows out of the character of the evidence which is always more or less conflicting. Consequently the court that has the opportunity to see the witnesses, hear their statements, observe their demeanor and compare their degree of intelligence is better able than an appellate tribunal to reconcile differences in testimony, or, if that be not possible, to ascertain the real

nature of the controversy. The present case, as even a cursory reading of the record will show, is one in which the lower court had occasion to apply all of the functions of a trial judge. He had every advantage in determining the questions presented. The trial of the cause occupied three days. Every witness called was present and testified in open court. The cause was carefully tried, orally argued and briefed upon its submission and the opinion of the court below (Ap. 29), reported in 203 Fed. 523, evidences conclusively that every question of fact and law in the case was duly weighed and conflicting evidence considered by the trial judge.

We submit, therefore, that the case is a proper one for the application by this court of the well-settled and universal rule that in an admiralty cause the decree of the lower court will not be reversed unless manifestly contrary to the evidence. The rule has been followed by an unbroken line of authority in this and other circuits.

The Alijandro, 56 Fed. 621 (9th Ct.);
Alaska Packers' Assn. v. Domincio, 117 Fed. 99 (9th Ct.);
Paauhau Sugar Plantation Co. v. Palapala, 127 Fed. 920 (9th Ct.);
Peterson et al. v. Larsen, 177 Fed. 617 (9th Ct.);
The Bailey Gatzert, 179 Fed. 44 (9th Ct.);
The Dolbadarn Castle, 222 Fed. 838 (9th Ct.);
The Hardy, 229 Fed. 985 (9th Ct.);
City of Cleveland v. Chisholm et al., 90 Fed. 431;
Erie & M. Ry. & Nav. Co. v. Dunseith et al., 239 Fed. 814.

In the present case the findings and conclusions of the learned trial court cannot be said to be manifestly against the evidence on the questions of fact involved, but, on the contrary, the overwhelming weight of the evidence supports the decree from which the present appeal is taken.

III.

THE "ELDER" WAS AN OVERTAKING VESSEL.

The relative positions of the "Kern" and "Elder" prior to the collision clearly show that they were those of overtaken and overtaking vessels with all the privileges and incidents thereto.

The case, therefore, is the simple one, and the trial court has found the fact to be, of a vessel running down another directly ahead after the overtaken vessel has twice given the danger signal in answer to the overtaking vessel's request for permission to pass her.

Preliminary to the rules of navigation embodied in the Act of June 7, 1897, a vessel is defined as under way within the meaning of the rules when she is not at anchor or made fast to the shore or aground, and, in Article 24 of the Inland Rules governing the navigation of vessels on the Columbia River, an overtaking vessel is defined as follows:

> "Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to

> the vessel which she is overtaking that at night she would be unable to see either of that vessel's side lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules * * *."

Appellant in the lower court conceded that the "Elder" was an overtaking vessel.* His proctors there said:

> "The case at bar is manifestly one of overtaking and overtaken vessels."

It was the "Elder's" duty to keep clear of the "Kern".

Being the overtaking vessel, it was the "Elder's" duty to keep clear of the "Kern". Article 24 so provides.

> "Notwithstanding anything contained in these rules, every vessel, overtaking any other, *shall keep out of the way of the overtaken vessel.*
>
> "Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's sidelights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, *or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.*"

* In Art. 3 of appellant's answer it is expressly admitted that "the 'Daniel Kern' was a vessel under way in the waters of the Columbia River" (Ap. 13). The comments appearing on pages 20 and 21 of appellant's brief are not sound, but in view of the admissions made in the lower court and in the pleadings they do not require consideration.

In Rule VI of the Inspectors' Rules and Rule VIII, Article 18, of the Act of Congress are embodied the practical rules of navigation which govern steam vessels in this situation:

> "When steam vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle, as a signal of such desire, and if the vessel ahead answers with one blast she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel."

The rules thus prescribed, imposing upon the overtaking vessel the duty of keeping clear of the privileged vessel, have found such uniform support in the admiralty courts that reference to but few decisions is necessary to show the trend of the law.

In

The Governor, F. C. 5645,

District Judge Betts said:

> "But the fact that they were running in the same direction, the one astern of the other, imposed

> upon the rear boat an obligation to precaution and care not chargeable to the same extent upon the other. In the light of this principle, the circumstances of the present case manifestly cast the burden of proof upon the 'Governor'."

The court applied the rule in

The Charles R. Spencer, 178 Fed. 862, 872,

saying, after referring to several authorities:

> "From these authorities it will be seen that it was not only the duty of the overtaking vessel to keep out of the way of the one leading her, * * *"

In Vol. 26 of The Laws of England, at page 463, Lord Halsbury says:

> "While the overtaken vessel keeps her course, the obligation of the overtaking vessel to keep out of her way is absolute."

The Ruth, 178 Fed. 749;

The Sif, 181 Fed. 415.

With such duty of keeping clear resting upon the "Elder" when she came into the collision, there necessarily followed, as the result of such collision, if she was to exempt herself from liability, the burden of proving two facts hereinafter mentioned.

The burden of proof resting on the "Elder".

Upon the "Elder" rested the burden of proving (a) that she was free from fault and (b) that the "Kern" was guilty of negligence contributing to the collision.

Judge Betts recognized this dual obligation on the part of the overtaking vessel, saying in *The Governor,* supra:

> "But it devolves upon the 'Governor' to show the prudence of her own conduct, as well as to prove negligence or misconduct on the part of the 'Worcester'."

And in

The Charles R. Spencer, supra,

the court made a similar observation as to the burden resting on the "Spencer":

> "From these authorities it will be seen that it is not only the duty of the overtaking vessel to keep out of the way of the one leading her, but, if collision occur, the burden is cast upon her to show that it occurred without her fault or negligence or bad navigation, but by the negligence of the leading craft."

To the same effect was the holding of the court in

The Sif, supra:

> "The Sif was the overtaking vessel, and, as such, had the burden placed upon her by the laws and usages of navigation of safely passing the slower ship, and *as such overtaking vessel the burden was upon her to show that the collision was occasioned by no fault on her part, but by some fault or neglect of the duty on the part of the Murcia."* * * *
>
> "As it was the duty of the Sif to select a place and to keep at a safe distance in attempting to pass and as she was the overtaking ship, it was her duty, *in order to exonerate herself, to show that the fault was that of the Murcia."* * * *
>
> "We find there is no fault on the part of the Murcia, and, as she was the overtaken vessel, the

> responsibility for the damage must rest upon the Sif, unless she satisfactorily explains the cause of the collision and *exonerates herself.*''

Judge Bean, in commenting upon the obligation of the overtaking vessel in

The Greystoke Castle, 199 Fed. 521,

said:

> ''She was therefore the overtaking vessel and obligated to keep out of the way. Article 24, Inland Rules. The burden of proof is upon her to show that the collision was caused by no fault on her part, but by some fault or neglect of duty on the part of the tug.''

The question of first concern to a determination of the question of liability, therefore, is that of alleged negligence on the part of those in charge of the navigation of the ''Kern'', for, if she were free from fault, liability rests upon the ''Elder'', as the collision manifestly was not the result of inevitable accident.

Was the "Kern" at fault?

In the answer filed by appellant (Ap. 12), negligence on the part of the ''Kern'' contributing to the collision was alleged in several particulars, some of which, on the trial, were left entirely without evidentiary support. Appellant charged:

(1) That the ''Elder'' plainly saw the ''Kern's'' green light when from one-half to three-quarters of a mile away, and that no answer was made to the one-whistle passing signal;

(2) That with the "Kern's" green light still visible, the "Elder" gave a second starboard passing whistle, which was answered by a cross whistle;

(3) That the "Kern's" searchlight was frequently thrown in the faces of those navigating the "Elder", from the time she first saw the "Kern" until the time of the collision, interfering with the direction and control of the "Elder";

(4) That no proper lookout was maintained; and

(5) That the barges were wrongfully exchanged on the river.

The "Kern's" green light.

The question of the visibility of the "Kern's" green light is of importance, in view of the failure of proof on the trial, only in that it shows how desperately appellant has reached out for a possible contributory fault on the part of the "Kern". In Articles 3 and 4 of his answer (Ap. 16-18), appellant alleges that from the time the "Elder" sighted the "Kern" the latter's green light was visible to those in charge of the navigation of the "Elder", and specifically denies that the "Kern" was then or there, or at any time after the "Elder" sighted her, in such position that the "Kern's" starboard side lights could not be, or were not, visible, or that she was headed down stream, and avers that the "Kern" and all of her rock barges were headed toward the Washington shore and obliquely across the channel of the Columbia. The answer was verified personally by the appellant before one of his proctors as a notary, on the 30th day of

November, 1909, more than two weeks after the collision, and after a hearing had been held before the U. S. Steamboat Inspectors. It is not to be presumed that the allegations of the answer were drawn without consultation by appellant with Captain Patterson, pilot of the "Elder", for such conference would be the most reasonable course for appellant and his proctor to pursue in their preparation for defense, so we may reasonably conclude that the foregoing denials and averments as to the visibility of the "Kern's" green light were based upon information furnished appellant by the pilot Patterson.

And yet, when Captain Patterson was called as a witness on the trial, and questioned as to the causes of the collision, not a word passed his lips in support of the allegations of the answer to which we have referred.

If it were a fact that the "Kern's" green light was visible to the "Elder" from the time she saw the "Kern" to the moment of collision, then the "Elder" did not occupy the position of an overtaking vessel, with all the obligations incident thereto, but was a crossing vessel, with the right of way, for she would then have been on the "Kern's" starboard side.

Art. 19 of the Inland Rules.

It follows, therefore, that if the defense embodied in the averments as to the visibility of the "Kern's" green light could have been sustained by the evidence, the burden of proof would have been shifted from the "Elder" to the "Kern".

Can it be doubted that proctors would have taken advantage of the fact had it existed? The voluminous denials and averments of the answer, and the thoroughness with which proctors tried their case, hardly bespeak an indisposition on their part to offer proof which would have relieved them of the burden they carry as proctors for an overtaking vessel.

Their failure to question Captain Patterson relative to the alleged visibility of the "Kern's" green light is not to be explained away upon the ground of immateriality. But a sufficient reason for proctors passing it in silence is found in the fact that on the subsequent raising of the "Kern", the physical damage which she had suffered *demonstrated,* and the lower court so found the fact to be, that the "Elder's" prow had penetrated the "Kern's" starboard quarter at an angle of approximately 34° abaft her beam. To have seen the "Kern's" green light, the "Elder" must have approached the "Kern" at an angle of not more than two points abaft her beam, so that at the moment of collision, to say nothing of the time when the "Elder" was farther up stream astern of the "Kern", it was physically impossible for those on the "Elder" to have seen the starboard light. But even this angle of collision was less than that of the course of the "Elder" approaching the "Kern", for at the time the "Elder" struck the "Kern", the latter was swinging her bow to starboard and her stern to port, by going ahead on a hard a'port helm, thereby tending to swing the arc of the green light's rays more towards the direction from whence the "Elder" came, and lessened the

angle abaft the "Kern's" beam at which the "Elder" was approaching. Add to this physical evidence of the absolute invisibility of the "Kern's starboard light, the testimony of all her officers and crew that she was heading downstream across the sterns of the rock barges, which were canted toward the Oregon shore, and complete refutation is had of the averments of the answer to which we have been referring. In view of these facts, it is not strange that the allegations of the answer were abandoned as a defense, and that proctor, upon the argument, in the lower court admitted that the green light could not be seen.*

The discrepancy between appellant's pleadings and proof is of importance, however, not merely because of failure to sustain the alleged defense, but because it necessarily goes to the credibility of appellant's principal witness.

The "Kern's" searchlight.

The condition of pleading and proof as to the use of the "Kern's" searchlight is similar to that of the averred visibility of the "Kern's" green light only more significant. It is charged in the answer (Ap. 22) that "when the 'Elder' first came in sight of the steamship 'Daniel Kern', the said 'Kern' was displaying and operating a powerful searchlight, and, carelessly and negligently, wrongfully and unlawfully, was flashing and directing the same much of the time up the river

*He there said:
"Mr. Denman: There is no question between us on this point; that is, that the 'Kern' was pointing downstream in such a position that we couldn't see either of her side lights, and that would indicate she was pointing the other way from us downstream."

and frequently into and upon the 'Elder' and into her pilot and wheel-house, and in such a manner as to embarrass and interfere with those in charge of the 'Elder' in directing and controlling her, and so continued to do up to the time of the collision".

If this were true, could there be any question as to its condemning the "Kern"? If the navigation of the "Elder" was thus interfered with, as it must have been if the searchlight of the "Kern" was turned upon her so as to blind the pilot and the quartermaster, is it reasonable to believe that proctors for appellant would have overlooked its certain effect upon the question of the "Kern's" contributory fault? The very fact that proctors pleaded it as a defense shows the significance which they attached to it. Furthermore, Rule VIII, Section 12, of the General Rules and Regulations prescribed by the Board of Supervising Inspectors expressly prohibits such an act. Those rules have the force of law (Rev. Stat., Sec. 4405).

And yet, on the trial, they studiously avoided any reference to the alleged use of the searchlight, despite the fact that they called as witnesses the four men who were in charge of the "Elder's" navigation at the time of the collision, Pilot Patterson, Mate Whiteman, Quartermaster Asktedt and Lookout Olson. Not a single question was asked them seeking to elicit any testimony to support the charge, though the information, upon which the averments of the answer were based, must have been obtained from some or all of the four witnesses, for they alone of the "Elder's" crew would know its truth.

The neglect to interrogate the witnesses cannot be explained as oversight, for on cross-examination, Captain Patterson's attention was specifically called to his testimony before the U. S. Inspectors. The significant omission of proctors to have Captain Patterson reiterate to the court the statement made before the inspectors, makes his testimony worth noting. On that hearing he said:

> "At the same time he had a searchlight on all the time, which blinded me and blinded the quartermaster in the wheel house. He was throwing his searchlight around over the river, and on the barges, and up the river, and at times the searchlight was right in the face of me and the man at the wheel" (Ap. 382).

If Captain Patterson thus spoke truthfully before the inspectors; if what was alleged in the answer was a fact, why was not such evidence laid before the trial court by appellant, upon whose shoulders rests the burden of showing that the "Elder" was free from fault and that the "Kern" was guilty of negligence contributing to the collision? If worth pleading, it was equally valuable as proof, for it is manifest that if the searchlight was turned upon the "Elder's" bridge and the pilot blinded, it was an interference with the navigation of the "Elder" as an overtaking vessel, which would have at least condemned the "Kern".

It is not sufficient for proctors to say that they passed it over because it was of no "causative effect", for such an assumption on their part would not only be a usurpation of the function of the court, but would be the wilful withholding of facts of which the

lower court was entitled to be advised, in consonance with the spirit of admiralty practice, in order that justice might be administered.

What then was the reason for Captain Patterson's silence before that court? Explanation is had in the fact that when the "Kern" was raised, the searchlight was found pointing just as the "Kern's" witnesses testified it had been used at all times prior to the collision, over the port bow, and in the further fact that it was, by reason of its construction, physically impossible to have so turned the searchlight as to have thrown its rays on a steamer approaching from astern, as the "Elder" overtook the "Kern" (Ap. 151, 152, 483).

We do not attribute to Captain Patterson a wilful misstatement to appellant or the inspectors; we take the more charitable view of a mistake. But if a mistake, it is a confession to an inaccurate knowledge and very poor recollection of the facts leading to the collision. If Captain Patterson made so grievous an error as to think that he had been blinded by the "Kern's" searchlight, when such was a physical impossibility, why is his recollection as to the actual incidents of the collision any more reliable? If his testimony before the inspectors was not the result of a faulty recollection, his credibility is impugned, and the maxim, "*Falsus in uno, falsus in omnibus,*" applies.

The Santissima Trinidad and The St. Ander,
7 Wheat. 283; 5 L. Ed. 454.

The "Kern's" lookout.

Appellant charged that at no time during the period mentioned did the steamship "Daniel Kern" have,

keep or maintain lookout, or any lookout, but, on the contrary, those in charge of her negligently and carelessly during all of said time failed to have or keep a lookout on board said steamship "Daniel Kern". There is no averment in the answer as to the alleged absence of a lookout, contributing to the collision, though, for such possible reason alone, was such absence, if any, of concern.

But was there no lookout? The testimony shows that the Mate Anderson and sailors were forward of the forecastlehead of the "Kern", as well as the watchman on the barge. The pilot was on the bridge and, in such a position, had an unobstructed view, as did those on the forecastlehead, of the approaching "Elder". So that the allegations as to want of a proper lookout fails in the face of incontrovertible evidence to the contrary.

There is no dispute in the case as to the number of whistles blown by the "Elder", for her navigating officers assert, and those on the "Kern" admit, that two single blast passing whistles were given. Whatever may have been the distance at which the *first whistle was blown*, the pilot in command on the bridge* and the mate and sailors on the forecastlehead of the "Kern" were advised from personal observation of the approach of the "Elder" from the moment of her first whistle, so that the alleged want of a lookout, even were it true, could not be regarded as a contributory cause. Upon this point the lower court found:

> "The officers in charge of the 'Kern' discovered in due time the approach of the 'Elder', and the

*The trial court found the distance to be one-half mile (Ap. 53-4).

> action taken was in pursuance of such discovery, and of the movement and signals given by the 'Elder' * * *." (Ap. 63-4.)

Commenting on the absence of a lookout on the "Aurora", the Circuit Court of Appeals for the Second Circuit in

The Aurora, 198 Fed. 383,

said:

> "* * * the fact that she had no lookout * * * is negligible. If a lookout had been on the bow of the tow, he could have done nothing more than report to the pilot of the tug what he knew already, namely, that the Coleraine was crossing the river on an oblique course."

In

The Livingstone, 113 Fed. 879,

it was charged that the "Traverse" was in fault for its failure to have a lookout. The court found that the absence of a lookout did not contribute to the collision, saying:

> "No other vessel interfered in any way with the navigation of either of the colliding vessels. * * * The Livingstone was sighted and seen by all when miles away. Her colored lights were made out a mile and a half off, signal of one whistle blown to her, and the navigation of the Traverse conducted with reference to her. The view was clear and unobstructed, and, so far as the evidence shows, nothing of any character or description occurred concerning the approach of the Livingstone of which the navigator of the Traverse was not advised from personal observation. Under these circumstances, we are not prepared to say that the absence of a lookout contributed to the injury. The Victory and The

Plymothian, 168 U. S. 429, 18 Sup. St. 149, 42 L. Ed. 519."

In

The Blue Jacket, 144 U. S. 371; 36 L. Ed. 469-477,

the Supreme Court said:

"It is well settled that the absence of a lookout is not material where the presence of one would not have availed to prevent a collision."

See, also,

The Admiral Farragut, 10 Wall. 334; 19 L. Ed. 946.

Granting for the sake of argument, that no proper lookout was being maintained, still the "Kern" is not to be condemned as in fault, for she did all that was required of an overtaken vessel. Had the "Kern" been moving at the time, her sole duty would have been to keep her course and speed.

Art. 21 of the Inland Rules.

Being constructively under way, within the intent of the rules (Preliminary Statement 2, Inland Rules), the analogous obligation, of continuing to do that which she was doing when the overtaking vessel approached, rested upon her, just as the duty of maintaining her course and speed rests upon the moving and overtaken vessel. The latter requirement is imposed upon all privileged vessels (Art. 21), and has its purpose in the necessity of requiring some uniform standard of conduct on the part of the privileged vessel, in order that the burdened one may safely determine the conduct necessary on her part to carry out her duty of keeping clear.

It is within the reason of the rule, then, to hold, where a vessel, being overtaken by another, is dead in the water, though constructively under way, because she is not drifting or made fast to the shore or aground, that her duty to the overtaking vessel is to remain at a standstill. If this be the duty of the overtaken vessel under those conditions, then the "Kern" fulfilled her obligations to the "Elder", for she did not change her position from what it had been when the "Elder" blew her first whistle until the collision was inevitable. Her going ahead at the latter moment, appellant admitted in the lower court to be an act *in extremis* (Ap. 228). So that in the contemplation of the law the "Kern" did all that she was required to do in holding, figuratively speaking, her course and speed. Having thus fulfilled her obligation, as the privileged vessel, to the "Elder", as the burdened vessel, she is not liable even though one of her crew was not acting in the sole capacity of lookout.

The Fannie, 11 Wall. 238; 20 L. Ed. 114, 115, 116;
The Delaware, 161 U. S. 459; 40 L. Ed. 771, 775;
The Havanna, 54 Fed. 411;
The Columbian, 100 Fed. 991, 994;
The Fannie Hayden, 137 Fed. 280, 283;
The Annie W., 181 Fed. 604, 607;
The Greystoke Castle, 199 Fed. 521.

Viewed in its every aspect, therefore, the "Kern" is not to be held in fault for an alleged want of a proper lookout.

The exchange of barges.

We know of no law making it unlawful or wrongful for the steamers "Hercules" and "Kern" to exchange

their barges on the Columbia River, as they did the night of the collision.

Appellee was at the time, as it had been for some years, engaged in furnishing rock to the U. S. Government for use in the construction of the Columbia River jetty. The rock was loaded onto the barges at its quarry, above Vancouver, and as the Government steamboat inspectors would not permit the "Hercules" to go to Fort Stevens, and the water up river was too shallow for the "Kern", an exchange of barges by the two steamers was a matter of necessity.

So far as the exchange of barges on the night in question was concerned, there is little disagreement as to where and how it took place. The "Kern", bringing up the light barges, let go of them somewhere in the vicinity of Cooper's Point, out of the channel, well toward the Oregon shore, and turned around and proceeded to the loaded barges. In the meantime, the "Hercules", which had passed down with the loaded barges, brought them to a standstill opposite Waterford, about 1000 feet off the Washington shore, and ¾ of a mile from the Oregon side of the river, and waited until the "Kern" had dropped the empty barges and was turned around and well down toward the loaded ones. As the "Kern" approached, the "Hercules" backed out from between the two side barges, in time to get away from them and turned around, so that the "Kern" could take her place with as little trouble and disarrangement of the barges as possible.

By this method of exchange, the loaded barges were not left drifting alone, except for the short time neces-

sarily required in one steamer leaving them and the other picking them up, and while the empty barges were adrift for a longer period, they were well outside of the channel used by the larger vessels. Surely there was nothing in this dropping of the loaded barges by the "Hercules" and the almost immediate picking them up by the "Kern", which menaced navigation! The steamers and barges had as much right to be there, and use those waters for that purpose, as had the "Elder", with no more obligation on their part to hug the Oregon shore than there was for the "Elder" to have taken that course, as the depth of water permitted. It may be true that the "Kern" and the "Hercules" had no right to obstruct navigation, but how can it be seriously urged that with 1000 feet of clear water on the Washington side and ¾ of a mile on the Oregon shore, navigation was obstructed?

Appellant devotes considerably over a page of his answer and a portion of its brief to reiterated charges of gross carelessness and negligence in exchanging the barges, but does not allege how such an exchange was the proximate cause of the collision on the part of the "Kern". He did say in the lower court, however, that had the "Kern" been actually under way down said river with said tow, or been engaged in making fast thereto off at one side toward the Oregon shore, from such course or fairway, the said collision could not and would not have occurred. The question as to the barges not being under way has nothing to do with the place of exchange, with respect to which the gross carelessness is charged in the answer. And while it

may be true that the collision would not have occurred had the "Kern" and her barges been over on the Oregon shore, neither would it have happened had they not been on the river at all. The point is that they were where they had a right to be, and the mere *passive* fact of their presence cannot be held a contributing cause of the collision, so long as ample room for passage was afforded. That the exchange of barges at that point did not obstruct navigation is best evidenced by the allegation of appellant's answer, wherein he avers:

> "That there was then and there and at said time between 1000 and 1200 feet of deep water sufficient for the 'Elder' to navigate between the said 'Daniel Kern' and the said Washington shore * * * for this claimant avers that there was ample room for the 'Elder' to pass to the right of the 'Kern' and between her and the Washington shore * * *" (Ap. 20-1).

Captain Patterson of the "Elder" also testified that he had plenty of fairway (Ap. 382).

A singularly decisive case, in point of fact, is that of

The James T. Easton, 27 Fed. 464, 466.

The leaving of the empty barges adrift off Cooper's Point certainly had nothing to do with the collision; nor, with ample breadth of channel and depth of water between the loaded barges and the Washington shore, all of which was fully known to the "Elder," is it possible to conceive how the act of the "Hercules" in dropping, and the "Kern" in picking up, the loaded barges can be said to have been the proximate cause of the collision. It is not the case of a steamer striking

an unknown vessel, adrift in the fairway, for the presence of the "Kern" and the work in which she was engaged was known to the "Elder" on the confession of her officers, and the finding of the trial court (Ap. 60), at least from the moment she changed her course at Cooper's point.

Appellant apparently realizes the soundness of the trial court's opinion upon this point, for he now says in his brief (page 17), "The Kern was within its rights in handling its tow in the fairway."

With the elimination of the foregoing defenses there remains for consideration the sole question of the "Kern's" whistles. It was upon the theory that the "Kern" was in fault for not having responded with similar whistles to the one-blast passing signals given by the "Elder" and in blowing the danger signal that the proctors rested their entire case upon the trial below, so far as concerned the question of possible fault on the part of the "Kern". If the alleged refusal of the "Kern" to answer in the affirmative the starboard passing signals of the "Elder" and the fact that it did give the danger signal were not the contributory causes of the collision, then liability must rest upon the "Elder".

The "Kern's" whistles.

It is admitted by both parties that the "Elder" blew two single blast passing whistles, indicating a desire to pass the "Kern" on the latter's starboard side. The question of the distance of the "Elder" from the "Kern" when the former gave her first

passing signal is of no importance in itself in determining the question of the "Kern's" alleged fault. The lower court, however, found that the "Elder" was then approximately a half a mile distant (Ap. 54).

The lower court also found that the "Kern" promptly answered the first passing whistle of the "Elder," not with a whistle that indicated permission to pass, but with the danger signal. Upon this question the court, after applying the well-settled rule that the testimony of witnesses affirming that they heard or saw a thing is entitled to greater weight than the negative testimony of other witnesses who affirm that they did not hear or see it, said:

> "Further than this, I am impelled to the firm conviction that the 'Kern' gave prompt response to the first signal of the 'Elder' with four short blasts of her whistle; and not only this, I am of the opinion that the officers of the 'Elder' testifying, or at least one or more of them in authority, did hear such response from the 'Kern,' and that the 'Elder' is chargeable with positive knowledge that it was given" (Ap. 56-7).

Upon the well-settled rule that such finding is conclusive, unless manifestly contrary to the evidence, that question should require no further comment. Rather than being contrary to the evidence the testimony conclusively shows that the first whistle of the "Elder" was answered.

Pilot Moran testified that he responded with a danger signal to *both* of the starboard passing whistles blown by the "Elder". In this he was corroborated by Captain Copeland (Ap. 147), Mate Anderson (Ap. 443), Chief Engineer Spaulding (Ap. 256), Jensen (Ap. 241),

Arneson (Ap. 263), all of the "Kern"; by Captain Church (Ap. 210-11) and Mate Hale (Ap. 232-3) of the "Hercules"; and by fisherman Nissen who was salmon fishing on the river abreast of Eureka Cannery (Ap. 137-8).

It is not surprising, therefore, that we find the trial court saying in its opinion:

> "* * * I am of the opinion that the officers of the 'Elder' testifying, or at least one or more of them in authority, did hear such response from the 'Kern' " (Ap. 56-7).

There can be no question but that the "Kern" responded with a danger signal to the "Elder's" first whistle, and yet whether she did or not is immaterial so far as concerns the alleged fault of the "Kern". The error charged is that in response to the "Elder's" second request for permission to pass, the "Kern" blew a danger signal while the "Elder" was at such a distance and in such a position as to have been able to safely pass the "Kern" to starboard. If she was not in such position, it is self-evident that no criticism is to be made of the "Kern's" response to the "Elder's" second whistle, regardless as to how favorable may have been the latter's position for passing at the time of her first whistle; if the "Elder" was so placed that she could have safely passed on the second whistle, then it is of no consequence as to how far distant from the "Kern" the "Elder's" first whistle was blown, or whether it was answered. The material question with which we are concerned, then, in passing upon the alleged contributory fault of the "Kern",

is that of the "Kern's" legal responsibility for having blown the danger signal in response to the "Elder's" second passing whistle.

Appellant in his brief, at page 31, states the question before the court as follows:

> "The point to this case is whether the Elder was a half a mile off at least, why did the Kern try to stop her?"

Was the blowing of the danger signals by the "Kern" a contributory fault?

Rule III, Article 18, provides:

> "If, when steam-vessels are approaching each other, either vessel fails to understand *the course or intention of the other, from any cause, the vessel so in doubt shall immediately* signify the same by giving several short and rapid blasts, not less than four, of the steam whistle."

Rule VIII, Article 18, provides:

> "When steam-vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle, as a signal of such desire, and if the vessel ahead answers with one blast she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or, *if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point,* she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they

have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel."

In

Vol. 25 of *Amer. & Eng. Encyc. of Law*, at page 966, the authors say:

"If the vessel ahead does not think it safe for the vessel astern to attempt to pass, she must give the danger signal, * * *. The vessel ahead must in all cases answer the signal of the overtaking vessel either by an assenting signal or by the danger signal" (citing cases).

Rule II of the Inspectors' Rules provides:

"Steam vessels are forbidden to use what has become technically known among pilots as 'Cross Signals', that is, answering one whistle with two, and answering two whistles with one. *In all cases, and under all circumstances, a pilot receiving either of the whistle signals provided in the rules, which for any reason he deems injudicious to comply with* instead of answering it with a cross signal, shall at once sound the danger signal and observe the rule applying thereto."

Rule I of the same Rules provides:

"*If,* when steam vessels are approaching each other, *either vessel fails to understand the course or intention* of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle, the Danger Signal."

The law is thus clearly defined that the danger signals *may not only be blown,* but *must be blown,*

(1) when an overtaken vessel *does not think it safe for the overtaking vessel to pass;* (2) when, *from any cause,* a vessel fails to understand the *course or intention of the other;* and (3) when a pilot receives a passing signal compliance with which he, *for any reason,* deems *injudicious.*

There have thus been prescribed signals and a course of navigation, which are intended to prevent collisions, whenever there is *any doubt* as to the absolute safety for one vessel to pass another. If there was any doubt on the part of Pilot Moran as to the *course or intention* of the "Elder", or *any reason* causing him to deem it *injudicious* to favorably respond to the "Elder's" request to pass, there was not only ample authority in the law for his taking the course prescribed, but a correlative duty to do so, for otherwise, the effect would be to prevent collisions only when the doubt as to the safety of passing was of some degree not defined in the law. The obligation, to say nothing of the right, to blow the danger signal, exists without discretion when there is *any* doubt as to safety of passing. If this were not the law, it would necessarily follow that the master of an overtaken vessel, before deciding whether to favorably respond to a passing signal, would be required not only to have a doubt as to the safety of passing, but to mentally stop and ask himself *whether such doubt was reasonable.* The giving of the danger signal would then depend, not upon the pilot's having a doubt as to the safety of passing, but upon his judgment as to the reasonableness of such doubt. But the rules of navigation pro-

vide that when, *in all cases and under all circumstances, for any reason, the pilot deems it injudicious* to comply with the passing signal, or when he *fails to understand the course or intention of the other;* or *when he does not think it safe* for the vessel astern to attempt to pass at that point, the danger signal shall be blown.

This being the law, one question alone remains for our consideration in determining whether the "Kern" was in fault as charged,—Did Pilot Moran have *any doubt* as to the course or intention of the "Elder", making it injudicious in his mind to assent to her passing signals?

To ask the question is but to answer it, for the very fact that he deliberately blew the danger signal indicates that, for some reason, he did not deem it judicious to reply with a like whistle. What this reason was is clear,—the fear of a collision, a doubt as to the safety of his own vessel from the oncoming "Elder".

When the first whistle of the "Elder" was blown, the "Kern" was heading down stream, across the sterns of the rock barges, which were canted toward the Oregon shore. The mate had just gotten out a port bow line from the "Kern" to the starboard barge, and was about to put a strain upon it (Ap. 439). Moran, who, at the time, was in the pilot house, upon hearing the "Elder's" whistle, went outside and looked astern* to see whence the whistle came, and

* Appellant at page 34 of his brief states that there "is no pilot house from which the pilot * * * has to go in order to see". Such statement is correct with respect to seeing objects forward or to either side of the pilot house, but obviously it is inaccurate with respect to seeing vessels approaching directly from astern. The rear of the pilot house, which is constructed of wood, obstructs the latter view.

finding a steamer heading for the "Kern", with all three of her lights showing, he waited a moment to see if she were altering her course, and finding that she was not, returned to the pilot house and blew the danger signal (Ap. 83-4).

He then immediately returned to the starboard rail of the bridge, to watch the "Elder", and after he had been there a few seconds, a second one blast whistle was received from the "Elder", and seeing that she was still coming on, showing her masthead and port and starboard lights, and heading right for the "Kern", he again jumped to the whistle as quickly as he could, and gave the danger signal for the second time (Ap. 85-6). He then went outside again, and for the third time, found the "Elder" still approaching head on (Ap. 87). Waiting a moment, he noticed her swing to port, and, concluding that she was backing, he ordered the "Kern's" engine full speed ahead (Ap. 87), with her helm hard a'port in the hope to thereby avoid the collision (Ap. 87, 105). The "Kern" had not moved to exceed 40 feet, if she had that, before the "Elder" struck her on her starboard quarter at an angle of about 34 degrees abaft the "Kern's" beam, cutting into her near the center line, and driving her against the barges with such force as to practically cut and break her stern off.

At the time he went ahead full speed, Moran thought the "Elder" to be very close, probably 25 to 30 feet (Ap. 88), while he judged her to be about 1000 feet off when he blew the first danger signal (Ap. 117), though it is apparent that his estimate of distances was approximate (Ap. 205).

The importance of the foregoing facts to the question we are discussing is that by reason of the course the "Elder" was running, approaching the "Kern" *head on, showing all three of her lights.* (Opinion, Ap. 54), and because of her apparent nearness to the "Kern", there was instilled into the pilot's mind a doubt as to the course or intention of the "Elder", the fear of collision, for he says, and who can gainsay him:

> "I made up my mind she was coming right for me, going to run me down." (Ap. 84.)
>
> "Well my reason was that I concluded there was nothing going to happen but a collision; that he was going to run right into me and I thought I would warn him of the danger he was approaching." (Ap. 102.)

That Moran was possessed of such fear of collision is perhaps best evidenced, not by his testimony on the trial, but by his warning to Captain Copeland after the "Elder's" first whistle, while the master was still in bed, "to get out as he (Moran) thought the 'Elder' was going to run them down" (Ap. 148). It was while so in doubt as to the course and intention of the "Elder" and because of his apprehension of collision, that Moran blew the danger signals. Is he to be condemned therefor, and the "Kern" held to be in fault? If so, it must be for but one reason, and that is, that his doubt or fear was not well founded, for, otherwise, the mere fact of doubt itself would be a justification. But as we have pointed out, the navigation rules do not provide for the blowing of the danger signal only when the pilot has a reasonable doubt. To

give them such construction would be to inject a standard of judgment, measured by what the ordinary prudent man would do or think, and yet the right to blow the danger signal exists *in all cases and under all circumstances* when a pilot receives either of the signals provided in the rules (i. e., passing signals) compliance with which he (not someone else), *for any reason, deems injudicious.* The right to blow the danger signal is measured by the judgment of the pilot in command, not by a standard of judgment of other men, for the rule provides that the danger signal is to be blown when *he,* the *pilot,* deems it injudicious to comply with the passing signal. His judgment at the time is entitled to great weight. Obviously if it had been followed by the "Elder" a collision would have been avoided.

And yet proctors for appellant would condemn Moran because certain witnesses, as the result of calm deliberation in the court room, taking time to think and reason, concluded that in their judgment, the "Elder", when 500 to 1000 feet astern of the "Kern", could have ported and cleared the latter had the "Kern" answered the "Elder's" second whistle with an assenting signal. Granting that this were true, and Capain Moran admits that it might be done, it does not lessen the fact that at the time he gave the danger signal he was possessed of doubt or apprehension as to his vessel's safety. He alone was the one to judge, and he chose the side of safety. And now because of it, proctors would hold him in fault for the resulting collision.

The James T. Easton, 27 Fed. 464.

Of him it might well be said, as did the court of the master of the "Sieman" in

The North Star, 151 Fed. 168, 174.

> "He ought not to be criticised * * * for exercising extreme caution."

The fact that the "Elder" collided with the "Kern" without any great change of course is *prima facie* evidence of danger of collision.

Wilder S. S. Co. v. Low, 112 Fed. 161, 166.

Not only, then, was Captain Moran apprehensive of the safety of his own vessel from the oncoming "Elder", but subsequent events showed how substantial were the grounds for such misgiving. To condemn Moran, under the circumstances, would necessitate the setting aside of the rules of navigation requiring the blowing of the danger signal whenever doubt exists as to the course or intention of the other vessel, and would disregard the imminency of the peril which afterward overtook the "Kern".

If such danger of collision existed, certainly Moran cannot be condemned for having obeyed the mandate of the rules, though proctors may assert, despite the fact that there is no supporting allegation in the answer, that at the moment the *second* danger signal was given, Moran knew that compliance therewith would necessarily precipitate a collision. Such assertion, however, would admit that danger of collision was then imminent, and would not only bring Moran's action within the privilege, to say nothing of the obligation, of the navigation rules, but would cast aside the testi-

mony of Pilot Patterson, that at the time the danger signal was received in answer to the "Elder's" second passing signal, the "Elder" was considerably distant to starboard and astern of the "Kern", for Patterson claims to have shaped his course immediately after passing Cooper's Point so as to carry the "Kern" at least half a point on the "Elder's" port bow.

But more significant than repudiating the testimony of Captain Patterson as to the course of the "Elder", would be the assumption of knowledge on the part of Moran of the inability of the "Elder" to comply with the danger signal and avoid a collision. It is manifest that such knowledge would require, among other things, special information as to the stopping and reversing ability of the "Elder's" engines under various conditions of trim and draft of the steamer, as well as, on the one hand, her ability to swing, and, on the other hand, the inability of her helm to change her course, to say nothing of the other innumerable elements which enter into the control of a ship's movements. No proof was offered on the trial to show that Moran possessed any knowledge as to the inability of the "Elder" to comply with the danger signal, so that on the record, any such contention would necessarily involve assumptions against Moran, for otherwise he could not be charged with knowledge that he knew a compliance with the danger signal meant collision. But with the burden of proof on appellant to show the "Kern" in fault, such burden cannot be sustained by such theoretical presumptions. The absurdity of any contention that Moran must have

known that compliance with the danger signal would result in collision, is best evidenced by Patterson's statement that he, himself, did not know the distance within which the "Elder" could be stopped, and by his delayed efforts to avoid the collision by stopping and reversing. If he did not know the "Elder's" stopping ability, how can presumption of such knowledge be entertained against Moran to support the burden of proof resting on appellant? And yet any contention that Moran should be condemned because of knowledge that compliance with the danger signal meant collision, is necessarily premised upon such presumption.

If such a presumption should in any case be sufficient to condemn the pilot of an overtaken vessel, the natural effect of such a principle of law would be to cause the pilot to hesitate between doubt as to the safety of his vessel, if he did not blow the danger signal, and apprehension of legal liability if he gave the danger signal and collision should result from inability of the overtaking vessel to comply therewith and avoid collision. It is needless to say that the rules of navigation were not designed to ever make prevention of collision dependent upon the hesitation of a pilot over the question of greater responsibility. On the contrary, they prescribe a course of navigation, which, if followed with promptitude and decision, would make avoidance of collision certain. For instance, if an overtaking steamer did not, without consent of the overtaken vessel, approach within such distance but what she could stop before the vessel being overtaken

is reached, the rules would be complied with and occasion for such presumption as we have been discussing would not arise. Further consideration of the proposition of thus condemning Moran will serve but to emphasize its unsoundness in law and its utter inconsistency with the spirit and intent of the rules of navigation.

Appellant attempts to make something out of what unquestionably was a misunderstanding on the part of Pilot Moran as to the necessity of an overtaking vessel to alter her course before she received an assent to her passing signal. Rule VIII of Article 18 seems to contemplate that the changing of the helm shall follow the assent to pass, for it provides, "and if the vessel ahead answers with one blast, she shall put her helm to port," etc. But it is a far cry from the mistake of Pilot Moran as to the meaning of such rule to the holding which appellant would ask this court to base upon such misunderstanding. An analysis of his brief will show that every material contention which he makes as to the alleged error of the "Kern" harks back to the misunderstanding as though by iteration and reiteration it could thereby be developed into a contributory fault. Not only that, but every contention as to the alleged proper navigation of the "Elder" and the alleged fault on the part of the "Kern" is based upon the assumption that the latter did not respond to the first passing whistle of the "Elder". Not once throughout his brief does he suggest that the misunderstanding of Moran was contributory to the collision.

Apparently appellant's position is that it is mandatory to let the vessel astern pass where it can be safely done. Such construction of the rule, however, is exclusive of any other contingency other than room to pass and makes it mandatory upon the vessel ahead to assent to the request of the vessel astern to pass, provided there is, as appellant contends, abundant room on either side of the vessel ahead for such passing. It is, furthermore, clear that such construction predicates the right to give the danger signal solely upon the question of room to pass and disregards entirely the course of the overtaking vessel, no matter with what degree of apprehension it may justly fill the navigating officer of the overtaken vessel. It is because there was such room to pass between the "Kern" and the Washington shore, of which there can be no question, that appellant would condemn the "Kern", for, if there had been any doubt of such room, on appellant's own admission Moran would have been justified in giving the danger signals, even though he did so believing that the request to pass should be accompanied by a change of helm.

Pressed to its conclusion by circumstances similar to those in the case at bar, such construction of the obligations of the rule would require the assenting signal so long as there was space to pass, even though the overtaking vessel approached at full speed directly toward the vessel ahead, so as to imperil her and run her down, unless, by a dexterous twirl of her steering wheel, her course is shifted and she glides by, however close may be the call. The one question which the

vessel ahead might consider would be, is there room to pass at that point? At what point? In the case at bar the point between the "Kern" and the Washington shore. The navigating officer of the vessel ahead, upon appellant's theory, is not to be permitted to take into consideration, in determining whether the danger or passing signal shall be given, the course, speed or intention of the approaching vessel, though it be such that only by a perfectly executed maneuver can the overtaking vessel pass. Upon such a theory the course, speed or intention of the overtaking vessel, however fraught with danger it may be, cannot be considered by the vessel ahead if the giving of the assenting whistle is mandatory in all cases, provided only there is sufficient room. But, if the course, speed or intention of the overtaking vessel may be given consideration by the vessel ahead, then it is apparent that the mandatoriness of the assenting whistle is conditioned upon other considerations than simply that of "room to pass".

It is manifest that appellant's construction of the obligations of an overtaken vessel under Rule VIII entirely disregards the equally mandatory Article 24, for, if Article 24 makes it imperative that "every vessel, overtaking any other, shall keep out of the way of the overtaken vessel," the latter certainly has the right to pass judgment as to whether that obligation is being fulfilled, as the duty of the vessel astern to keep clear is but saying that the vessel ahead has the right of being free of danger of collision. And, if the right to pass judgment exists, the overtaken vessel has the

right to express by some means its apprehension of possible peril involved in the course of the overtaking vessel and such expression can only be by the danger signal.

It might be suggested by appellant that Article 24 makes no provision for the danger signal, but the answer to that is that the rule prescribes a course of navigation which does not contemplate the necessity of the danger signal. It forbids a certain course of navigation on the part of the overtaking vessel, just as the last provision of Rule VIII forbids a similar course of navigation on the part of the vessel ahead, to wit:

> "The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel."

The latter rule does not provide for the danger signal by the overtaking vessel if the vessel ahead crowds upon her course, yet no one would have the temerity to suggest that, if such crowding was apparent or apprehended from the course of the vessel ahead, the overtaking vessel would not have the right to give the danger signal because the rule did not specifically prescribe it in such contingency. Equally, then, would the vessel ahead have the right to give the danger signal if she were apprehensive of her safety from the course of the overtaking vessel. This was exactly what Moran did, and that his apprehension was well founded was immediately demonstrated by the collision.

The Carroll, 8 Wall. 302, 305.

Article 24 provides:

> "Notwithstanding anything contained in these rules every vessel, overtaking another, shall keep out of the way of the overtaken vessel."

"Notwithstanding anything contained in these rules" must mean, among other things, that notwithstanding the obligations on the overtaken vessel under Rule VIII, Article 18, the overtaking vessel shall keep out of the way of the vessel being overtaken. With such a duty resting upon the overtaking vessel, she must at all times be in such a position and subject to such control that her movements shall not bring her into collision with the vessel ahead if the latter does not give the assenting whistle provided by Rule VIII. This, then, prohibits the overtaking vessel from approaching the vessel ahead at such a course and at such a rate of speed that she cannot stop, if so commanded by the danger signal, without colliding with the overtaken vessel, *and yet this was exactly the position in which Patterson placed the "Elder",* with the result that he could not keep her out of the way of the "Kern". He was, therefore, in violation of the rule as a more specific examination of the navigation of the "Elder" will demonstrate.

If, then, there is no ground for condemning Moran for blowing the danger signal, because of alleged knowledge that it would precipitate a collision, we are brought back to the original proposition of holding him in fault because he blew the danger signal at a time when the "Elder" could have ported and passed the "Kern" in safety had the latter assented thereto,

although Moran was then apprehensive of the safety of his own vessel and danger of collision was impending. As we have said, doubt as to the course or intention of the "Elder", causing Moran to deem it injudicious to comply with the passing signal, was sufficient justification for such signal. But, even if such doubt did not exist and there was no danger of collision impending, the blowing of the danger signal would not condemn the "Kern", for she can only be held in fault for a contributory act. In the absence of some movement on her part or failure of duty to get out of the way, the giving of the danger signal cannot *per se* be held to be a contributory cause. It might afford ground for complaint against the pilot to the United States Steamboat Inspectors, but cannot render the "Kern" liable. It was so held in

The Governor, Fed. Cas. 5645.

> "We may censure any rigid adherence to strict right by which one competing boat interposes embarrassments in the way of her competitor, and may regret the want of a magnanimous and liberal course of conduct which might relieve a vessel of superior speed and endeavoring to get ahead, from delay or difficulty in accomplishing that object. But the Court is only empowered to adjudicate the legal rights of the one and the responsibility of the other."

In

The North Star, 151 Fed. 168,

the Court of Appeals for the Second Circuit held that failure to give an assenting whistle to a passing signal blown by an overtaking vessel, even though there was

room to pass, was not a contributory fault, the court saying:

> "The question whether the Siemens was also in fault for the collision depends in part upon the meaning to be given to rule 5. This rule imposes upon the steamer ahead the duty of co-operating with the vessel astern when the vessels have reached a point where they can pass safely. *It is not its meaning that the vessel ahead shall give an assenting signal and slacken to a slow speed whenever requested to do so by a vessel astern provided there is room for the latter to pass safely; for if this were the requirement, it would be inconsistent with Rules 20 and 22 of the Act of Congress.* Those rules, which but express the law of navigation that everywhere obtains, recognize the privilege of the vessel ahead to maintain her speed, and the duty of the vessel astern to keep out of the way, until the vessel astern has overtaken the vessel ahead. All rules of navigation are qualified by the fundamental one that in obeying them due regard must be had to any special circumstances rendering a departure from them necessary to avoid immediate danger; and it is the contemplation of rule 5 that when the vessel ahead has been overtaken, and the overtaking vessel is about to pass ahead, the immediate danger which then arises requires that the former shall forego her privilege, and so govern her movements as to assist in avoiding it. Then it is, and not before, that rule 5 means that the vessel ahead, after signifying her willingness by signals, should 'slacken to a slow rate of speed'.
>
> *Thus interpreting the rule, we thing the Siemens was not in fault for her failure to give an assenting signal to the first signal from the North Star.*"

In other words, the court held that as Rule 5, requiring the vessel which had been overtaken to forego her privilege because of the immediate danger from pass-

ing, did not begin to operate until such danger of passing actually existed, there was no obligation under the rules requiring the vessel being overtaken to assent to a request to pass from the vessel astern, even though there was room for passing, as such requirement would be inconsistent with the privilege accorded the overtaken vessel by Rules 20 and 22 of the Act of Congress. If Rules 20 and 22 secured to the "Siemens" such a right as exempted her from condemnation for her refusal to answer the "North Star's" request to pass, then equally is it impossible to hold the "Kern" in fault for having dissented to the "Elder's" request to pass, as the same rights were secured to the "Kern" by Articles 21 and 24 of the Inland Rules, as were accorded to the "Siemens" by Rules 20 and 22 of the Act of Congress.

This court should not hold that Articles 21 and 24 of the Inland Rules are susceptible of the construction that the overtaken vessel must assent to the request of the overtaking vessel to pass if it can be accomplished in safety, when the Circuit Court of Appeals for the Second Circuit has held that a river regulation (Rule 5), if given such construction, would violate Rules 20 and 22 of the Act of Congress. If Rules 20 and 22 were to be given such construction, Rule 5 would not be inconsistent with the Act of Congress, but in harmony with it.

And in

The Fontana, 119 Fed. 853, 856,

Circuit Judge Lurton, delivering the opinion of the

Court of Appeals for the Sixth Circuit, said to the same effect:

> "Twice or three times the Appomattox refused the Interocean's request to pass up on her port hand. *It is not essential that this should have been denied upon thoroughly good reasons,* or that the master of the Appomatox discriminated arbitrarily in consenting a few moments before that another and larger steamer might pass up on the same side."

If it is not essential that a denial of a request to pass should be based upon thoroughly good reasons, it follows that the mere blowing of a danger signal by an overtaken vessel in answer to the passing signal of the overtaking vessel, cannot, of itself, render the former liable. In other words, the danger signal *per se* is not to be deemed a contributory cause of a collision which subsequently occurred between the passing vessels. It is necessary, before the overtaken steamer shall be held in fault, that some act, or the omission of some duty, on her part, shall have been of causative effect in producing the collision. Applied to the "Kern", she is not to be condemned from the mere fact of having blown the danger signal, even though it may have been at a time when the "Elder" could have ported and cleared with safety. If she is to be held in fault, it is not because the "Elder" could have safely passed by porting, for that involves alone the giving of the danger signal, but because of the danger signals being coupled with some act, or the omission of some duty, which contributed to the collision. And yet the "Kern" was absolutely passive, rigidly per-

forming her duty as the overtaken vessel in maintaining the position she occupied at the time the passing signals were given, without crowding upon the course of the "Elder" or interfering with her navigation. It is natural, therefore, to find the trial court reaching the conclusion that it was

> "* * * satisfied that Moran did not refuse his consent to pass arbitrarily, or with any wanton purpose of vexing her or impeding navigation. He assumed for his own safety that he ought to withhold his assent because the Elder was heading directly for his boat."

And it is not surprising to find it saying:

> "* * * I have concluded that the mistake of Moran was not the proximate contributing cause of the collision."

This court should, therefore, apply the principle announced by it in

The Yucatan, 226 Fed. 437, 441,

where, speaking through Judge Rudkin, it said:

> "The court below found that the proximate cause was the careless and negligent handling of the Yucatan, coupled with the failure to have a licensed pilot on board familiar with the river, the winds, and the currents. The rule is well established that the findings of the trial judge in admiralty will not be set aside, except for clear manifestation of error. An examination of the record convinces us that the findings on the question of negligence and proximate cause are fully warranted by the testimony, and the decree is accordingly affirmed."

The very nature of the collision explains appellant's shifting defenses and contentions.

Here we have the simple case of the "Kern", headed down-stream, dead in the water, making fast to three loaded barges, with one thousand feet of clear water to starboard and a half mile of navigable channel to port, on a clear starlight night, with the water slack and no appreciable current, being run down despite warning signals, from almost directly astern by the "Elder", a fast ocean-going steamer which had seen the "Kern" at least half a mile distant.

In a somewhat similar case, *The Cephalonia,* 29 Fed. 332, Judge Benedict, in speaking of a collision between an overtaking and overtaken vessel, said:

> "The duty of the tug, whistles or no whistles, was to hold her course. It was no part of her duty to get out of the way of the steamer. If, as the steamer approached the tug from behind, the tug held her course, she discharged all her duty. * * * While in the performance of that duty, she was run over and sunk by the steamer. No doubt can be entertained as to the liability of the steamship for the damages that resulted."

Is it any suprise that the burden is with the "Elder" to show fault on the part of the "Kern" and, despite resourceful efforts, that such burden has not been sustained?

The James T. Easton, 27 Fed. 464.

Not only was there resting upon the "Elder", as the overtaking vessel, the burden of proving that the collision was occasioned by fault or neglect on the part of the "Kern", but, to exonerate herself, also the duty of showing that the collision occurred without her fault or negligent or bad navigation; having failed in the former has she succeeded in the latter?

Was the "Elder" free from fault?

Upon rounding Cooper's Point, Captain Patterson claims to have laid the "Elder's" course (1) so as to take her probably not over 300 to 400 feet off the Washington shore (Ap. 318, 345-6); (2) so as at the same time to carry the "Kern" one-half point on the "Elder's" port bow" (Ap. 318).

The bearings taken by Captain Crowe show that the "Kern" sunk 990 feet off the Washington shore and about five-eights of a mile below Cooper's Point (Ap. 275-6).

It is thus manifest that if on steadying on her course below Cooper's Point the "Elder" had the "Kern" half a point on her port bow, Captain Patterson was in error in estimating her passing distance off the Washington shore at 300 or 400 feet from the "half point course" would carry him 730 feet off shore and 260 feet inshore from the "Kern". This discrepancy is of importance in that it shows, as do other matters in the record, the inaccuracy of Captain Patterson's knowledge of his course that night.

If the "Elder" was proceeding upon a course which would have carried her within 400 feet of the Washington shore, it is self-evident that her masthead and port lights alone would have been visible to the "Kern", and equally would it have been true if the "Elder" had shaped her course after rounding Cooper's Point so as to hold the "Kern" half a point on her port bow. If the "Elder's" three running lights, red, masthead and green. were visible to the "Kern", as the lower court found the fact to be (Ap. 54), then

either the screen of the "Elder's" green light was defective, thereby making the green light visible across the "Elder's" bow to the "Kern", or the "Elder" was not carrying the "Kern" over half a point on her port bow. And as the "Elder" continued on her course toward the "Kern" it is a geometrical certainty that the angle of the "Kern's" position to the "Elder's" bow increased (Ap. 422-3); thereby, in effect, placing the "Kern" more and more on the "Elder's" port bow as the distance between the two decreased, making it impossible for the "Elder's" green light to have been visible to the "Kern". If the green light was visible when the "Kern's" danger signals were blown, it goes without saying that Captain Patterson was again in error as to the "Elder's" course.

Was the "Elder's" green light visible to the "Kern"? Pilot Moran says that from the time the "Elder" blew her first whistle to the moment of the collision, the "Elder" was coming toward him showing all three lights (Ap. 86). In this he was corroborated by Mate Anderson (Ap. 441) and Seaman Arneson (Ap. 274), and the pilot's reason for having blown the danger signals was that he was alarmed by the very fact of the visibility of the "Elder's" running lights, for it indicated to him that the "Elder" was approaching on a course which would run the "Kern" down. Find that the green light was not seen by the pilot and those on the "Kern" who were in a position to observe the lights, and you destroy the pilot's motive and reason for having given the danger signals. Is it reasonable to believe that an experienced pilot on board of the

"Kern", lying dead in the water, making fast to a fleet of barges, with no tide or current to move them (Ap. 32) would have blown a danger signal to the "Elder" showing only her red light, indicating that she was overtaking the "Kern" on a course which would pass the latter to starboard? It would not be conduct consistent with ordinary navigation for no danger of collision would have been apparent, but, on the contrary, the blinding of the "Elder's" green light would have indicated to those on the "Kern" that the "Elder" was not approaching the former. but was on a passing course to starboard, either parallel with or diverging from the "Kern" without the remotest possibility of collision unless the course of the "Elder" was changed so as to show her green light.

Then, too, the circumstances of the collision, the angle of the blow, the time elapsing between the reversing of the "Elder" and the impact, all go to substantiate the fact of the visibility of the "Elder's" green light. We, therefore, feel confident that this court will have no difficulty in agreeing with the lower court in the conclusion that Moran was correct in his statement as to the course of the "Elder", and if Moran was right, Patterson's recollection was necessarily at fault.

Upon blowing the "Elder's" first passing whistle, and hearing no response, although the "Kern's" danger signal was blown, Captain Patterson claims to have slowed the "Elder's" engines, and at this reduced speed the "Elder" continued to forge ahead toward the "Kern". The pilot then blew a second passing signal, again requesting permission to pass the "Kern" to

starboard, and again receiving the danger signal in reply Captain Patterson instantly ordered the "Elder's" engines reversed full speed and her helm put hard a'starboard, but almost immediately the "Elder" struck the "Kern". *Was there any fault in such navigation?*

The "Elder" was in violation of Article 24, and Rule 8 of Article 18 of the Inland Rules for she failed to keep out of the way of the "Kern" as an overtaken vessel.

If Captain Patterson heard the "Kern's" danger signal in answer to the "Elder's" first passing whistle, as found by the lower court (Ap. 56-7), then the "Elder" *was at fault in not so checking her speed so as to avoid overtaking the "Kern"* until passing signals were properly exchanged.

If the "Elder's" pilot did not hear any response from the "Kern" to his first passing whistle, then with the "Elder" an overtaking vessel he should have acted upon such silence as a dissent to his request to pass, and should have so checked the "Elder's" speed as to avoid overtaking the "Kern" until proper passing signals were exchanged. In not treating the failure to hear an answering signal to his passing whistle as a dissent, *and in continuing on his course until he could not stop without ramming the "Kern",* Captain Patterson was in fault. That failure to receive a response to a passing signal is to be acted upon as a dissenting whistle, has been held in many cases.

For instance, in

The Orange, 46 Fed. 411-412,

it was said:

> "The fact that no reply to her signal came from the ferry-boat was notice to her that her signal had not been heard, and it was her duty to stop at once."

In

The Florence, 68 Fed. 940-942,

Judge Brown said:

> "The failure to hear the 'Eldorado's' whistles was not, however, a contributing cause to the collision, because it did not mislead the 'Eldorado', or give her the least apparent right to go ahead of the 'Florence'. *It was practically equivalent to an expressed dissent* because the 'Eldorado' had no right to go ahead without an expressed assent of the 'Florence'."

The City of Chester, 78 Fed. 186.

Not only was the "Elder" at fault in the things she failed to do, but even more negligent was the course of her navigation leading to the collision.

Rounding Cooper's Point, Pilot Patterson headed her for what he knew to be the "Kern" (Ap. 60) for he had just passed the empty barges abreast of the point on a course which left his running lights open to the "Kern' despite the fact that he had 1000 feet of clear water to starboard and over half a mile to port of the "Kern". He blew a one whistle to the "Kern" somewhere between 100 and 1500 feet below Cooper's Point as near as can be ascertained, and claims to have received no response thereto. Thereupon he slowed the

"Elder" down, and immediately sounded a second whistle, and received a danger signal from the "Kern", and instantly ordered the mate to ring full speed astern and the quartermaster to put his helm hard a'starboard. The former immediately complied and repeated the signal several times. The quartermaster starboarded his helm as quickly as possible—and then the collision.

When the "Kern's" second danger signal was received in response to the "Elder's" second whistle, the "Elder" was so close to the "Kern" that collision was apparently inevitable.

Patterson testified on direct examination that the reversing full speed astern order was rung continuously until they were almost to the "Kern" because he wanted to notify his engineer that something was wrong; that he wanted to back his ship as hard as he could (Ap. 329). Yet, when pressed immediately afterward on cross-examination as to the urgency he was evasive, but finally explained the necessity of going full speed astern as that he had seen the barges and boat ahead; seen an obstruction of some kind, but did not know whether it was the barges or what it was then (Ap. 331-2). This, notwithstanding the fact that he had just passed the "Hercules" and empty barges, and must have seen the "Kern's" searchlight illuminating the barges. Indeed, before the inspectors, he had had the searchlight in his face! Later, however, he admitted that at the time he backed full speed, he knew that the collision was imminent (Ap. 337-8).

The exigency of the situation was more frankly stated by the mate, who worked the telegraph on the

pilot's orders. He says that the reason for his continued ringing was that he wanted to impress upon the engineer the necessity of giving her all she could stand, because he could see that it was hardly possible to avoid collision so close were they to the "Kern". And, even then, it was a matter of doubt as to whether they could stop her (Ap. 404).

The extremity of the "Elder" at the time that full speed astern was ordered, is also shown by the statement of the quartermaster, who testified that they struck the "Kern" almost immediately after he put her helm over to starboard, and that she had not swung much to port (Ap. 421-423). It was perhaps most graphically described by the first officer who said that he turned out when the engine was reversed, and was probably getting into his "handiest rags" when the collision came (Ap. 429-433-4). And even the lookout knew when the engine was reversed that they were going to strike the "Kern," so close were they to her (Ap. 428).

The proximity of the "Elder" to the "Kern" when the reversing order was given, was admitted by the pilot in other ways.

It is .provided in the Inspector's Rules under the title "Signals," preceding Rule I:

> "When vessels are in sight of one another a steam vessel under way whose engines are going at full speed astern shall indicate the fact by three short blasts on the whistle."

It, therefore, became obligatory upon Captain Patterson to blow the three short blasts thus required,

when the "Elder's" engine was reversed full speed. *He did not obey the rule,* however, and when pressed on cross-examination as to his reasons for not doing so, he testified:

> "A. I didn't have no opportunity to do it.
> Q. Why not?
> A. Was trying to find what this object was ahead of me." * * *
> "Q. Why didn't you?
> A. I said, I didn't have time to do it. I was trying to find out what this obstruction was ahead of me" (Ap. 365).

Again, Patterson, though not in accord with the mate and lookout of the "Elder", insisted that the whistles blown by the "Kern" in answer to his second passing signal were *cross-whistles.* If he so understood them, while it was his duty to stop and back the "Elder's" engines, it also was *obligatory* upon him *to at once sound the danger signal.*

Rule II, *Inspector's Rules.*

He did not obey the rule however.

Why? His explanation shows the extremity of the "Elder" and the imminency of collision to which he had previously testified.

> "A. Because I didn't have an opportunity to do it. I was trying to find what was ahead of me. There must be some obstruction ahead of me" (Ap. 339).
> "A. I didn't have an opportunity. I was trying to find out what was the matter. I says to the second mate, 'For God's sake, what were those fellows trying to do?'
> Q. You didn't have an opportunity to blow?
> A. I was busy trying to find out what this obstruction was ahead of me.

Q. How long did it take you to find out?

A. I didn't have any time to fool any time away, I will tell you that.

Q. What is that?

A. Didn't have much time to fool away.

Q. When you say you didn't have much time to fool away, *you meant you didn't have very much time between the time you received the danger signal and the collision.* Is that what you mean?

A. *That is what I mean, yes, certainly''* (Ap. 341).

The fact of the collision coming within so short a time after the reversing order that Patterson did not have an opportunity to blow either the danger signal or the three short blasts indicating that the ''Elder'' was reversing, coupled with the testimony of the mate that at the time of reversing he could see that they could hardly avoid a collision, and that of the lookout that at that time he knew they were going to strike, and that of the quartermaster that the collision came almost immediately after he got his helm hard over, and that the ''Elder'' did not have time to swing very much, speaks more emphatically, than can we, of the dangerous proximity of the ''Elder.'' And yet, appellant says that Moran had no right to fear a collision.

Then, too, the angle and sharpness of the cut in the ''Kern's'' side, and the fact that the ''Elder'' cut approximately 12 feet into the ''Kern'' to within ten inches of the center line of her main deck, crunching through the guard, planking, and white oak frames, 10 x 12 inches, spaced 18 inches centers at the top

and built in solidly at the bottom, breaking five deck frames of oak, and cutting through the ceiling, deck planking, bulwarks and cabin, and driving the "Kern" around against the barges with sufficient force to practically break off her stern, demonstrates not only that the quartermaster was correct in saying that she had only altered her course slightly to port, but that at the moment of impact the "Elder" had enormous headway. Having reversed under an order for full speed astern, with that order repeated and repeated so as to get her full backing power, the fact that she was still traveling at a high rate of speed at the time of the collision, shows conclusively that the "Elder" was in dangerous proximity to the "Kern" when the reversing order was given.

The effect of the foregoing testimony, the failure of the pilot to blow the danger signals and the three short blasts and his reasons therefor, and the angle and character of the cut, is to make certain that the "Elder" was but a short distance off the "Kern" when her engine was reversed.

And yet, to diverge a moment, proctors would condemn Moran for having blown the danger signal. Isn't it apparent, if the nearness and course of the "Elder" was so fraught with risk of collision as to fill Patterson with fear when he heard the "Kern's" danger signal in answer to his second passing whistle, that to condemn Moran would be to hold, that despite a justified apprehension of the safety of the "Kern" because of the course, speed and nearness of the "Elder", he should have foregone his fear and have

trusted to the "Elder" not continuing to hold the course upon which she was approaching, and have assumed that her pilot would clear the "Kern"? But the rules require that the danger signal should be blown when there is *any doubt as to the course or intention* of the other vessel.

The point of it all is that the "Elder" was so navigated that, when the "Kern" answered her second passing whistle with the danger signal, she had gotten into such a position—so close to the "Kern"—she could not be stopped before striking the latter.

The point for the court's consideration is the question as to whether that was proper navigation.

The "Elder" was an overtaking vessel. Appellant so admitted when he conceded in the lower court that the "Kern's" green light was not visible to the "Elder,"* and that the allegations of the answer in that regard were without foundation. As such an overtaking vessel, she was the burdened vessel, with a positive obligation resting upon her of keeping out of the way of the "Kern". If the rules of navigation prescribing such duty are to be given force and effect, is it not manifest that they require the burdened vessel to be so navigated that she shall not get into such a position that she cannot be stopped without colliding with the vessel she is approaching and overtaking. In no other manner can the obligation of keeping clear be fulfilled.

* There his proctor said: "There is no question between us on this point; that is, that the 'Kern' was pointing downstream in such a position that we couldn't see either of her side lights, and that would indicate she was pointing the other way from us downstream."

> "To be so near the vessel ahead in that place was a fault, and a fault that caused the collision."
>
> *The Hackensack,* 32 Fed. 800.

The effect of the burden thus placed upon the "Elder" was that she should not be permitted to approach the "Kern", without giving a proper passing signal and having it concurred in, to within such distance that she could not be stopped without striking her. Otherwise, the rule requiring the "Elder" to keep clear would be for naught. There was then a zone of danger—that distance within which she could not be stopped without striking the "Kern"—into which proper navigation prohibited the "Elder" from entering, and yet her pilot, without knowing the distance within which she could be stopped (Ap. 370-1-2-3) deliberately approached the "Kern" to within such distance, and at such a speed, that, when he suddenly backed her full speed, he, and everyone concerned in her navigation, knew that collision with the vessel being overtaken must inevitably result. Is it possible it can be said that such was proper navigation? And yet, if the "Elder" is to be relieved of liability, such must be the contention of appellant. We are loath to believe that this court will give such contention its serious consideration.

What excuse have appellant's proctors offered for the course of the "Elder"? Not alone have they attempted none, but despite the fact that the burden of proof is upon the "Elder" to show that the collision was occasioned by no fault on her part but by some fault or neglect on the part of the "Kern", they have

failed to cite a single case which even tends to sustain their position. The reason is, of course, that it cannot be found.

Further faults of the "Elder".

Appellant's theory of his own case confesses a further fault of the "Elder" for by the admission of Patterson, as well as the others concerned in the "Elder's" navigation that the collision was unavoidable by reversing full speed, the "Elder" was not only in violation of Rule VIII of Article 18 and Article 24, but also of Article 27 of the Inland Rules. The latter rule imposed upon the "Elder" the duty of keeping clear even though it might have required a departure from the other rules. It follows, therefore, that if the collision could have been avoided by any other course of navigation than that pursued by Patterson, the "Elder" was in fault for not adopting it. Upon this point the lower court said:

> "The 'Elder' should have been eagerly mindful of her rapid approach to the 'Kern' on the course she was steering, and should have avoided running so near to the latter as to put her in peril of a collision. Under the circumstances she was at liberty to depart from the letter of the rules and steer to the starboard of the 'Kern', notwithstanding the refusal of the latter to let her pass—this to avoid 'immediate danger'" (Ap. 59).

The court's opinion on this question also is well supported by the authorities. In

The North Star, 151 Fed. 168, 173,

the court said:

> "All rules of navigation are qualified by the fundamental one that in obeying them due regard must be had to any special circumstances rendering a departure from them necessary to avoid immediate danger."

The Circuit Court of Appeals for the Second Circuit announced the same principle in

The Mauch Chunk, 154 Fed. 182,

Circuit Judge Coxe, saying:

> "The navigation rules * * * are enacted to prevent collisions, not to induce them, and perverse adherence to the rules is not justifiable when it is manifest that such a course is certain to result in disaster."

Proctors for appellant were tireless in their efforts in the lower court to show the ability of the "Elder" to clear the "Kern" by porting or starboarding her helm when within 1000 feet, or even 500 feet, of the latter. Patterson, himself, stated on direct examination that the "Elder" could not only have cleared the "Kern" in 500 feet, *but could turn half way around in 1000 feet* (Ap. 321). He estimated his distance from the "Kern" when he received the danger signal in response to his second passing whistle at 1000 to 1500 feet (Ap. 321). It is, therefore, manifest, if proctors rely upon the testimony of their own pilot, that had Patterson put the "Elder's" helm either hard a'starboard or hard a'port when he received the "Kern's" second danger signal, the "Elder" would not only have cleared the "Kern," but would have never reached the line of her position. Knowing that a collision was imminent (Ap. 337-8), Patterson admits

that skillful navigation would have avoided the collision.

Again, Patterson persisted that the "Kern's" answering whistles to his second passing signal were *cross whistles*. If they were cross whistles, the only interpretation Patterson could place upon them was that of an unwillingness for the "Elder" to pass the "Kern" on the latter's starboard side, and the willingness that she pass to port. They could not be construed by Patterson as a refusal to pass at all for such dissent is by Rule VIII of Article 18 to be indicated by the danger whistles. Though cross whistles were forbidden, if the signals given by the "Kern" were understood as cross whistles, they did not indicate any obstruction, as contended by Patterson, to the port of the "Kern." On the contrary, though unlawful whistles, they indicated to him a willingness to have the latter pass on the "Kern's" port side. While under Rule II of the Inspector's Rules, it was Captain Patterson's duty to blow the danger signal and stop and reverse, yet if he knew that such maneuver would probably precipitate a collision, whereas by going ahead on a hard a'starboard helm, the "Elder" would clear the "Kern" to port, it was Patterson's duty under Article 27 to disregard Rule II and follow the course which would avoid the collision. Failing to do so, he was in fault.

The decree should be affirmed with instructions to enter judgment against appellant and his stipulator on the appeal bond.

The court will observe from the decree (Ap. 636) that although appellee's damages were assessed at the

sum of $41,839.83, judgment for the sum of $25,000 only was entered against the United States Fidelity & Guaranty Company, stipulator on the bond given for the release of the "Elder", that sum being the amount specified in the bond. The United States Fidelity & Guaranty Company has not appealed from the judgment or decree entered against it, but is alone named in the title of this appeal as an appellee.

Costs and interest on the sum of $25,000 from the first day of May, 1910, were awarded against appellant, who appeared and answered as owner of the "Elder" and who defended and contested and still resists appellee's demands.

An appeal bond and supersedeas in the sum of $40,250 was later given by appellant, when he took his appeal, with the Fidelity & Deposit Company of Maryland as surety. The condition of the last named bond is such that if appellant abides by and performs whatever decree may be rendered by this court, the obligation will be null and void; otherwise it is to remain in full force and effect. That latter bond is therefore subject to the decree of this court.

Upon this point the Supreme Court in

The Wanata, 95 U. S. 600; 24 L. ed. 461.

said:

> "Where the claimant appeals from the decree of the District Court. the bond and other stipulations follow the cause into the Circuit Court; and, upon the affirmation of the decree, the fruits of the appeal bond and other stipulations may be obtained in the same manner as in the court below, they

> being in fact nothing more than a security taken to enforce the original decree, and are in the nature of a stipulation in the admiralty."

It is submitted, therefore, that, even if the court should be of the opinion that this appeal presents any question for its consideration (the decree from which the appeal is taken being based on the lower court's findings of fact), the "Elder" has not sustained the burden resting upon her as the overtaking vessel of proving herself free from fault, for the record shows her to have been in fault in the following particulars:

(1) She violated Article 24, and Rule 8 of Article 18 of the Inland Rules, in not keeping clear of the "Kern".

(2) She was in fault in not so checking her speed as to avoid overtaking the "Kern" until passing signals were properly exchanged.

(3) She was in fault in being so navigated that when her engine was reversed upon receiving the danger signal in answer to her second passing whistle, she could not be stopped without striking the "Kern".

(4) She violated Article 27 of the Inland Rules in not adopting some course of navigation other than that pursued by Patterson.

We respectfully submit, therefore, that the decree of the lower court should be affirmed in all respects with directions to enter judgment for costs and interest as heretofore directed by the district court against appel-

lant and his stipulator on the appeal bond—The Fidelity and Deposit Company of Maryland.

Dated, San Francisco,
February 8, 1918.

Respectfully submitted,

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